integration with an MVPD would allow News Corp. to make a credible threat that it will withhold broadcast retransmission consent rights, giving News Corp. leverage to demand carriage of its affiliated cable programming.[721] Cablevision contends that this pressure to carry News Corp. programming would harm program diversity by thwarting cable operators' ability to select the programming that their subscribers consider most desirable, including new or independent programming services.[722] Cablevision asserts that News Corp. would be using the very rights conferred upon broadcasters to promote diversity and localism to contravene those policy goals.[723] Commenters also assert that, after the transaction, News Corp would have the incentive and ability to deny access to its affiliated cable network programming to competing MVPDs, which would weaken or eliminate these competitors, thereby harming diversity in the distribution of video programming.[724]

261. *Discussion.* Although the Applicants assert that the proposed transaction would not harm program diversity, but would increase program diversity[725] we find that, absent our conditions, the transaction would be likely to reduce program diversity. As we conclude above in our discussion of the video programming market, the transaction will enhance News Corp.'s incentive and ability to engage in temporary foreclosure of access to its RSN and broadcast television station programming in order to raise rival MVPDs' costs for News Corp programming and/or secure other carriage concessions. Such a strategy of foreclosure would reduce program diversity on a short term basis because consumers lack access to the foreclosed programming. In the long run, the increased costs paid by MVPDs to News Corp. also can reduce program diversity. For example, to obtain RSN or local broadcast station programming from News Corp., an MVPD may accede to News Corp.'s demands to carry its affiliated cable networks, or to pay supracompetitive rates for News Corp. programming. Absent these increased costs, the MVPD might have elected to carry a new niche network that would have expanded the types of programming available to its subscribers. We find, however, that by constraining News Corp.'s ability to threaten to foreclose programming and thereby raise prices, and by requiring Applicants to submit bids to the arbitrator for RSN and broadcast station programming on an unbundled basis, the conditions we impose herein will protect against the potential harms to program diversity posed by this transaction.

3. Viewpoint Diversity

262. Another of the Commission's goals in the area of media policy is protection of viewpoint diversity. Accordingly, the Commission has restricted ownership of media outlets in certain ways. The Commission's rationale has been that ownership diversity leads to viewpoint diversity, a rationale that has been sustained in court.[726] Our rules do not, however, prohibit cross ownership of DBS and broadcast outlets, nor have they ever prohibited such ownership structures.

[721] Cablevision Comments at 14-15; *see also* NRTC Petition at 13.

[722] Cablevision Comments at 14-15

[723] Cablevision Comments at 24

[724] Cablevision Comments at 28-29; ACA *Comments* at 3, 7, 16; NRTC Petition at 14; JCC Comments at 54.

[725] Applicants contend that one of the public interest benefits of the transaction will be DirecTV's carriage of more programming targeted at culturally, ethnically, and linguistically diverse audiences. Application at 42. Applicants' contentions relating to this benefit are discussed at Section VIII.B.8.

[726] *See, e g., F C C. v N C.C.B.*, 436 U.S 775 (1978).

condition the Application on a prohibition on bypass of local Fox affiliates, a prohibition on discrimination by DirecTV against unaffiliated local television stations, and a ban on information exchange between News Corp. and DirecTV concerning affiliation agreements and retransmission consent agreements.[738] NAB also asserts that the Applicants should be required to expand local-into-local service into all markets by 2006 in order to ensure that the proposed transaction does not slow the rollout of local-into-local service.[739]

266. APTS/PBS urge us to impose conditions on approval of the transaction to promote diversity, including forbidding DirecTV from segregating local broadcast stations on wing satellites,[740] and requiring DirecTV to carry the free, over-the-air non-duplicative digital signals of public television stations where local television stations are being carried pursuant to SHVIA.[741] Maranatha also urges us to condition grant of the Application on a requirement that DirecTV continue to offer local broadcast television signals on a single satellite dish on grounds that the transaction may result in DirecTV using a second dish to favor News Corp. O&Os and discriminate against other broadcasters.[742]

267. Applicants assert that News Corp. would have no incentive to engage in an affiliate bypass strategy, and that such a strategy, even if practical, would be counter to News Corp.'s own interests.[743] Applicants assert that NRTC is seeking a DBS cross-ownership ban and that NRTC's arguments are without merit.[744] In support of this, Applicants note that the Commission has considered and rejected cable-DBS cross ownership restrictions, although such cross ownership presents more obvious competitive issues than does broadcast-DBS cross ownership.[745] They further assert that prohibiting broadcast-DBS cross ownership would be contrary to recent trends in media ownership regulation and the vacation/repeal of the cable-broadcast cross-ownership rule.[746] In light of these actions, as well as DBS' smaller share of the MVPD market, Applicants contend that there is no basis for limiting broadcast-DBS cross ownership.[747] Applicants state that the transaction will have no effect on viewpoint diversity in small markets because Fox does not own any stations in such markets, so there

[738] NAB Comments at 25-27

[739] NAB Comments at 27.

[740] APTS/PBS Comments at 6

[741] APTS/PBS Comments at 9-10.

[742] Maranatha Comments at 1-2; Reply at 4.

[743] Applicants' Reply at 62-64.

[744] Applicants' Reply at 65-66.

[745] Applicants' Reply at 65 (citing *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331, 11394-95 (2002)).

[746] Applicants' Reply at 65-66 (citing *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) ("*Fox Television*"), *rehearing granted*, 293 F.3d 537 (D.C. Cir. 2002) (vacating cable-broadcast cross-ownership rule); *1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 3002 (2003) (repealing cable-broadcast cross-ownership rule)).

[747] Applicants' Reply at 65-66.

271. In contrast, we agree with Commenters who contend that the transaction can enhance News Corp.'s incentive and ability to persuade competitors to carry its affiliated programming. Specifically, as we held above, the transaction may enhance News Corp.'s incentive and ability to extract higher compensation from competing MVPDs in exchange for carriage of its most popular programming—RSN and broadcast programming. Such compensation may include monetary compensation, but also carriage of News Corp. affiliated networks. To obtain RSN or broadcast programming from News Corp., an MVPD may accede to News Corp.'s demands to carry its affiliated cable networks, or to pay supracompetitive rates for News Corp. programming. Absent these demands and higher costs, the MVPD might have elected to carry an independent rival network that would have expanded the sources of programming available to its subscribers. However, we find that this potential harm is remedied by the conditions we have imposed with respect to competing MVPD access to such programming.[753]

272. We decline to adopt APTS/PBS's proposal that we require DirecTV to carry the digital signals of public television stations. The public television station digital signal carriage condition does not address a potential harm specific to the proposed transaction. Given that this proposal does not relate to a transaction-specific issue, it is not appropriately considered in this proceeding. The Commission will not consider industry-wide concerns or establish rules or policies of general applicability in this license transfer proceeding.[754] The record contains no evidence that the transaction will give News Corp. an increased incentive or ability to discriminate against public television stations, or any other evidence of a potential harm which would warrant the imposition of requirements different from those to which other MVPDs are subject with regard to digital carriage of public television stations.

273. With regard to APTS/PBS's proposed condition to restrict DirecTV from segregating local broadcast stations to wing satellites, we recognize that the proposed transaction may give DirecTV greater incentive to favor News Corp.'s Fox broadcast network programming and therefore to move other broadcasters onto other satellites. There is not a majority to decide whether this increased incentive results in a merger-specific harm. Nor is there a majority willing to resolve APTS/PBS's request that the Commission clarify its requirements under SHVIA and specifically, that, in providing local-into-local service pursuant to SHVIA, DirecTV could not place some local broadcast stations on wing satellites. The rationale for their decisions is contained in each of the Commissioners' separate statements.

B. Effect on Network-Affiliate Relationships ("Bypass" Issue)

274. *Positions of the Parties.* NAB contends that as a result of the proposed transaction, News Corp. will have a strong incentive and ability to "bypass" local Fox broadcasting affiliates and instead distribute Fox programming via a national feed.[755] NAB asserts that News Corp. would realize immediate benefits from such an action, including immediate cost savings from reduced or eliminated retransmission consent payments and increased advertising revenue[756] that would otherwise have gone to

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[753] *See id*

[754] Questions concerning the carriage of the digital signals of television broadcast stations are the subject of a pending rulemaking proceeding *Carriage of the Transmissions of Digital Television Broadcast Stations*, 13 FCC Rcd 15092 (1998).

[755] NAB Comments at 11, 15, NAB Comments, Exhibit 1, Decl. of J. Gregory Sidak (Jun. 16, 2003) ("Sidak Decl.")

[756] NAB Comments at 11; Sidak Decl. at ¶¶ 14-19.

such collusion presents only upside and no cost if News Corp. and a vertically integrated cable MSO enter into an agreement to raise the prices of the News Corp. programming carried by the cable MSO's systems and the cable MSO's programming carried by DirecTV, because the higher programming fees would cancel each other out for the two companies, while independent distributors and consumers would bear the burden of this anticompetitive behavior in the form of higher programming prices and subscription fees.[764] EchoStar argues that the criteria used by the DOJ and the FTC to determine the likelihood of lessened competition through coordinated interaction as a consequence of a horizontal merger are present in this transaction.[765] EchoStar argues that the relevant MVPD markets are concentrated and exhibit comparatively substantial barriers to entry.[766] In the average geographic region, EchoStar contends, the incumbent cable provider holds roughly 80% of the MVPD market, and DirecTV holds about 10%, resulting in a highly concentrated market (an HHI over 6000). Accordingly, EchoStar claims that collusion or coordination is likely.

277. EchoStar also argues that News Corp. has a history of collusive behavior with the largest cable MSOs.[767] Furthermore, EchoStar avers that the involvement of the same firms and same individuals substantially raises the risk of repeated collusion. EchoStar asserts that in 1996 and 1997, News Corp.'s announcement that it intended to enter the DBS business in the United States (by means of a merger with EchoStar) caused Primestar Partners (a cable MSO-DBS joint venture) to react and convince News Corp. to pull out of the deal with EchoStar in favor of a transaction with Primestar. According to EchoStar, the DOJ found that when it was clear that News Corp. would not compete with cable operators, the cable companies dropped their resistance to carrying certain Fox programming networks. As a result, DOJ brought suit against Primestar and News Corp. alleging collusion. The Primestar/News Corp. transaction was abandoned in the face of this litigation.[768]

278. EchoStar further argues that easy detection of deviation from the collusive arrangement makes it easier to maintain collusive arrangements. According to EchoStar, there would be no need to detect deviations because of the win-win arrangement whereby the two vertically integrated distributors would agree to raise all of their programming prices. In addition, EchoStar argues that the higher prices could be embedded in superficially legitimate program carriage agreements, so there would be no need to police deviations from some illicit backroom deal.[769] Regarding punishment for deviation, EchoStar states that deviations from collusion can be policed automatically by the kind of mutually beneficial agreement that the proposed deal would make possible -- for example, if one partner wanted to charge an independent distributor lower programming rates, it might no longer be able to finance the higher programming rates charged by the other partner. In addition, EchoStar argues that our program access

[764] *Id* at 33.

[765] *Id.* at 33 citing DOJ/FTC Guidelines § 2.1.

[766] EchoStar Petition at 33-34

[767] *Id.* at 34-36

[768] EchoStar Petition at 32 (citing *See United States v. Primestar, Inc et al.*, No. 1:98CV01193 (D.D.C.) (filed May 12, 1998) ("DOJ Primestar Complaint"), available at http://www.usdoj.gov/atr/cases/f1700/1757.pdf).

[769] EchoStar Petition at 36.

this problem will be avoided and disputes EchoStar's claim that News Corp.'s incentives in the proposed transaction are the same as those in the PrimeStar transaction. The Applicants contend that the PrimeStar transaction involved News Corp. investing in an organization made up of cable operators, while the present transaction involves News Corp. investing in a DBS operator that has dedicated itself to competing with cable operators.[777] Finally, Applicants argue that consistent comments from cable operators opposing this proposed transaction and reflecting a recognition of a strengthened DBS competitor further negate EchoStar's theory that the transaction will result in collusion and the reduction of price competition between cable and DBS operators.[778]

282. *Discussion.* We find EchoStar's theories of cable collusion unpersuasive. The record in this proceeding indicates that the MVPD market has been and will remain fiercely competitive between cable operators and DBS providers. EchoStar's claims regarding potential collusion between cable MSOs and the Applicants post-transaction are highly speculative.

283. Moreover, several fundamental bases supporting EchoStar's collusion theory are flawed. At the outset, EchoStar's arguments concerning market concentration are misdirected. EchoStar estimates market concentration in the MVPD market based on the national market shares of the three major MVPD platforms (i.e., the cable MSOs and the two incumbent full-CONUS DBS providers) and assumes that vertically integrated cable MSOs will collude with the Applicants to raise programming prices. In assessing the likelihood of collusion on the prices of video programming, however, it is the characteristics of the programming market and not the MVPD market that are relevant. Even a cursory examination of the programming market reveals, however, that there are numerous owners of cable networks and that many of the programming owners are not vertically integrated with MVPDs.[779] This suggests that, if the News Corp. and vertically integrated cable MSOs collude to raise the price of their programming, this attempted price increase alone would prove unprofitable.

284. We also disagree with several of EchoStar's factual claims regarding the history of collusion in the MVPD industry. EchoStar does not accurately describe the first PrimeStar lawsuit brought by DOJ and 45 states.[780] News Corp., in fact, was not involved with that lawsuit, which involved integrated cable programmers that created a joint venture, PrimeStar, used to coordinate their activities. In the transaction before us, there is no joint venture to tie together the disparate economic interests of the parties. We note that in the case of PrimeStar, the firms had to form a company to create a mechanism by which they could commit to sell to only one DBS competitor, which was jointly owned. That mechanism included a joint economic interest and an enforcement provision to avoid the cheating problem. The proposed transaction creates no such mechanism.

285. With respect to the second PrimeStar lawsuit, DOJ filed suit to block a horizontal merger in which MVPDs in the same relevant market as DBS, and also owning a DBS firm, PrimeStar, agreed to acquire a potential DBS competitor that owned rights to DBS orbital slots and in which News Corp.

[777] *Id.* at 74.

[778] *Id.*

[779] *2002 Video Competition Report*, 17 FCC Rcd at 26980-88, Tables C-1 and C-2.

[780] *See United States v. Primestar Partners, L.P*, 1994 WL 196800 (S.D.N.Y.); *State of New York v Primestar Partners, L P.*, 1993 WL 720677 (S.D.N Y.).

of cable broadband services is wholly unsupported and defies the evidence contained in several recently announced partnerships with major providers of DSL broadband access.[786]

D. Exclusive Arrangements with Unaffiliated Programmers

289. *Positions of the Parties.* Some commenters are concerned that the combination will allow DirecTV to secure exclusive contracts for desirable programming that is *not* affiliated with News Corp. to the detriment of competing MVPDs and consumers.[787] These commenters seek to end DirecTV's ability to enter into exclusive contracts with unaffiliated programmers, such as the NFL.[788] EchoStar contends that News Corp 's ability to offer worldwide distribution to content providers will result in exclusive arrangements for DirecTV.[789] According to EchoStar, News Corp.'s dominant presence in Great Britain, Asia, and Latin America will enable it to out-bid EchoStar for sporting events such as World Cup Soccer or the Olympic Games.[790] EchoStar contends that News Corp.'s ability to outbid EchoStar would not be the result from normal, market-based competition, but from the leveraging of market power abroad to create market power in the United States.[791]

290. ACA is concerned that News Corp. will have strong incentives to expand DirecTV's practice of entering into exclusive arrangements for popular content, such DirecTV's current NFL Sunday Ticket offering. ACA contends that such arrangements could be used to target small cable competitors that are ill-equipped to secure such deals.[792] Accordingly, ACA urges the Commission to require Applicants to make such "all" News Corp. and DirecTV programming, including unaffiliated programming carried by DirecTV, available to small cable operators under reasonable prices, terms, and conditions.[793] CFA agrees, asserting that the Applicants' program access commitments must be expanded to prevent News Corp. from entering into exclusive arrangements with third parties.[794]

[786] Vince Vittore, *Bellsouth Samples Satellite with DirecTV Resale Setup*, TELEPHONY, Sept. 8, 2003 (reporting on BellSouth's agreement to resell DirecTV service); Kris Hudson, *Qwest Might Tell You How to Pay Less*, DENVER POST, Nov. 3, 2003 (reporting that "Qwest now offers DirecTV's satellite service in Arizona and Washington state."); SATELLITE WEEK, November 24, 2003 (reporting that "a DirecTV spokesman confirmed reports that a strategic marketing agreement with Verizon was in the works but declined to give details. Reports have said Verizon would offer DirecTV service as part of its product mix. 'Both companies expect to bring their products to market after the first of the year. We'll announce details at that time,' the DirecTV spokesman said.").

[787] EchoStar Petition at 25-26, 64, ACA Comments at 21-23; ACA Reply Comments at 7-8, CFA Reply, Attachment at 3.

[788] EchoStar Petition at 64.

[789] EchoStar Petition at 25-26.

[790] EchoStar Petition at 25-26.

[791] EchoStar Petition at 25-26.

[792] ACA Comments at 21-23; ACA Reply Comments at 7-8.

[793] ACA Comments at 23.

[794] CFA Reply, Attachment at 3.

over-the-air television O&Os and affiliates, its ownership of or acquisition of satellite distribution platforms—which are not free to the public—is unlikely to expand or enhance News Corp.'s ability to secure rights to the Olympics. To the extent that other U.S. programming distributors are willing and able to offer wider, free distribution of these few events, they are likely to remain on at least an equal footing with News Corp. in the bidding for distribution rights.

293. In conclusion, we find objections concerning exclusive programming arrangements with third parties unrelated to the present transaction. There is no evidence in the record to support a finding that the proposed transaction will increase the incentive or ability of DirecTV to enter into exclusive arrangements with programmers, and commenters have not convinced us of the benefits to the public of limiting the ability of unaffiliated programmers to enter into exclusive contracts with DirecTV.

E. Applicants' Conduct in Foreign Jurisdictions

294. *Positions of the Parties.* Several parties contend that News Corp.'s alleged anticompetitive track record and market power with respect to its MVPD satellite provider BSkyB in the United Kingdom (UK) should be factored into the Commission's determination of the potential harms of this proposed transaction.[803] EchoStar and JCC argue that News Corp.'s operation of BSkyB offers a "preview of what can be expected in the U.S."[804] JCC claim that BSkyB's UK track record underscores the risks that this transaction will expand opportunities for News Corp. to artificially inflate programming costs and impose unfair tying and bundling requirements for content it controls in order to harm rival content suppliers and distributors.[805] EchoStar recommends that the Commission should not accept News Corp.'s claim that it lacks market power in the United States programming markets and accordingly should conduct its own investigation in light of the anticompetitive incentives recognized by the UK regulatory authority, the conduct of News Corp.'s vertically integrated UK subsidiary, and the UK regulatory authority's finding that News Corp. is dominant in UK programming markets.[806]

295 Applicants respond that the "preview" should be encouraging for domestic consumers because BSkyB offers a fully digital, interactive service with a host of features not yet available in the United States.[807] Moreover, Applicants claim that the allegations of BSkyB's malfeasance in the UK are irrelevant to the Commission's review of the proposed transaction based on the Applicants' reliance on a 1999 Commission decision regarding an MCI-EchoStar-News Corp. license transfer application.[808]

(Continued from previous page)
around the world to everyone who has access to television. Rights are only sold to broadcasters who can guarantee the broadest coverage throughout their respective countries free of charge." *International Olympic Committee - Organisation - Facts And Figures* at http://www.olympic.org/uk/organisation/facts/broadcasting/index_uk.asp (visited Oct. 9 2003).

[803] *See* JCC Comments at 49-54; EchoStar Petition at 26-30; *see also* CDD Petition at 6 (calling the Commission's attention to the MVPD market in Italy).

[804] EchoStar Petition at 26; JCC Comments at 49-50.

[805] JCC Comments at 54.

[806] EchoStar Petition at 30.

[807] Applicants' Reply at 70.

[808] *Id* (citing *Application of MCI Telecommunications Corporation*, 16 FCC Rcd 21608, 21621 (1999) (*MCIT/EchoStar*)).

its wholesale and retail operations.[816] BSkyB also committed to modify certain of its programming carriage requirements in response to concerns raised by OFT.[817] OFT determined that the undertakings to which BSkyB agreed were sufficient to avoid a formal referral to the UK's Monopolies and Mergers Commission.[818]

299. In its 2002 review of BSkyB, OFT again reviewed numerous aspects of BSkyB's business practices in response to various complaints from BSkyB's wholesale customers and retail competitors.[819] OFT focused on three main areas: whether BSkyB had imposed a margin squeeze on its retail competitors; whether discounts in BSkyB's mixed program bundling scheme prevented rival premium channel providers from entering the market; and whether BSkyB's rate card discounts were anti-competitive.[820] In framing its investigation, OFT determined that BSkyB held a dominant position in the market for the wholesale supply of certain premium sports channels and certain premium films channels.[821] Under UK law, however, dominance in and of itself is not a violation of the UK Competition Act of 1998. Rather, abuse of a dominant position must be shown. OFT determined that BSkyB had not abused its dominant position in either sports or film programming, nor in the manner in which it made that programming available to its competitors. OFT determined that there was insufficient cause to find that BSkyB had exercised a margin squeeze on its competitors.[822] It further determined BSkyB's mixed bundling wholesale price strategy was not an abuse of its dominant position.[823] Finally, OFT determined that BSkyB's rate card discounts were not an abuse of its dominant position and had not forestalled entry into the wholesale market for premium channels.[824] Thus, in its most recent investigation of BSkyB's business practices, which built upon its previous investigation, the principle

[816] *Id.* at 9 and Appendix A, at 117.

[817] *Id.* at 10-18, 115-116.

[818] *Id.* at 17.

[819] Office of Fair Trading, *BSkyB Investigation: Alleged Infringement of the Chapter II Prohibition ("2002 Review")*, Dec. 17, 2002

[820] *Id.* at 4.

[821] *Id.* at 14-43; 44-63. With respect to sports channels, OFT focused only on channels showing content available strictly via pay TV, specifically the UK Football Association Premier League football matches and those films that had exceeded $50 million in ticket sales in the U.S. BSkyB had secured exclusive license to the broadcast rights of 66 Premier League live matches, or 100% of the market. Under European Commission precedent, market shares significantly exceeding 70% are by themselves an indication of dominance. With respect to films, BSkyB has exclusive contracts with seven major Hollywood studios, which together supplied more than 70% of the films sold in the European Economic Area These rights were distributed across only two BSkyB channels: Sky MovieMax and Sky Premier.

[822] *Id.* at 135.

[823] *Id.* at 151.

[824] *Id.* at 165

impact of the transaction in Brazil where News Corp. provides satellite subscription service in competition with DirecTV.[829]

302. Applicants urge the Commission to reject EchoStar's call to consider the impact of the proposed transaction on Latin America. First, Applicants note the Commission's prior holding that the effects of a transaction arising outside of the United States are not relevant to the Commission's public interest analysis of the transaction.[830] Second, Applicants argue that the 1997 merger of Hughes and PanAmSat is not analogous to the proposed transaction.[831] The Applicants contend that the impact on the Latin America video market was raised by a party, Comsat, not the Commission, and was more relevant to that transaction because the relevant market for that transaction was the international telecommunications service market. The Applicants conclude that the proposed transaction does not address that market and raises no similar issues.[832]

303. *Discussion.* We find that commenters have failed to provide persuasive evidence as to why the Latin America MVPD market is relevant to our consideration of the harms resulting from the proposed transaction. As the Applicants indicate, the Commission generally does not consider harms resulting from a transaction occurring outside the United States in our public interest analysis of a transaction, unless the transaction directly impacts a relevant United States market.[833] We also agree with the Applicants that the 1997 Hughes-PanAmSat transaction targeted a different market from the markets at issue here.

G. DirecTV and Fox Network Service in Alaska and Hawaii

304. *Positions of Parties* Microcom argues that the Commission should deny the proposed transaction unless the Commission conditions its approval with measures designed to address the alleged failure of Hughes and News Corp. to provide satellite service to Alaska consumers.[834] Microcom contends that DirecTV has failed to provide Alaska and Hawaii with comparable service to that provided in other states even though existing regulation requires them to do so.[835] Microcom also contends that News Corp. is the only major broadcaster that has effectively denied many Alaska commercial establishments Fox network programming by refusing to allow DBS satellite reception of distant Fox affiliate stations by commercial establishments outside the grade B contour of the local Fox affiliates and

[829] Letter from John F McNaughton and Peter D.P. Vint, Marcondes Advogados Associados, Counsel to Tecsat, to Marlene H. Dortch, Secretary, FCC, Dec. 12, 2003.

[830] Applicants' Reply at 75 (citing *General Electric Capital Corp. and SES Global, S.A.*, 16 FCC Rcd 17575, 17594 (2001) ("We need not analyze the impact of the proposed transaction on competition in the provision of satellite services to foreign countries that do not involve service to or from the United States.").

[831] *Id* at 75-76.

[832] *Id.*

[833] *See supra* note 105

[834] Microcom Comments at 1

[835] *Id.* at 1-2.

requiring that these establishments install a C-band satellite system to receive the programming from a satellite many cannot see, *i.e.*, that is below or close to the horizon.[836]

305. The Applicants argue that Microcom's allegations are meritless and do not represent cognizable reasons for the Commission to deny approval of the proposed transaction or to condition it as Microcom suggests. The Applicants claim that DirecTV has always provided Alaska with the same programming it offers to continental U.S. subscribers although with larger satellite dish antennas for reception.[837] The Applicants also dispute the allegation that commercial establishments in Alaska are denied DBS reception of distant affiliate signals, noting that copyright law permits satellite carriers to retransmit distant signals for private home viewing only and not into commercial establishments.[838]

306. *Discussion.* The Commission's rules require that DBS licensees provide service where technically feasible to Alaska and Hawaii, and DBS licensees must offer packages of services in Alaska and Hawaii that are reasonably comparable to what they offer in the contiguous 48 states.[839] The issues raised by Microcom regarding DBS service to Alaska and Hawaii are not specific to this transaction and are more appropriately being addressed in another Commission proceeding focused specifically on those issues.[840] Further, issues raised regarding News Corp.'s provision of distant affiliate signals involve interpretation of copyright law and are not properly addressed in this proceeding.[841]

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[836] *Id.* at 2. To address these alleged public interest harms facing Alaska consumers, Microcom requests that the Commission impose the following conditions on its approval of the proposed transaction: (1) within one year of completion of the transfer, DirecTV must start offering small dish service to Alaska and Hawaii that provides all programming from its core slot at 101° (small dish coverage is defined as anything under on meter in the Anchorage, Fairbanks, and Juneau DMAs and the Honolulu DMA); (2) PanAmSat will make a good faith effort to ensure that all future satellites provide coverage equal to the CONUS over all of Alaska where the elevation angle is 5° or greater consistent with international agreements (including the Aleutian islands); (3) failing condition 1 above, News Corp. should be required to subsidize DirecTV equipment prices and installations to keep the overall cost for consumer services consistent with the CONUS pricing or their nearest competitor in Alaska (alternatively, they should make available for sale on Dish Network's Alaska and Hawaii 110° spot beams their exclusive sports programming packages); (4) immediately make all DirecTV and Fox Networks promotions applicable to all 50 states without exception; and (5) Fox Networks immediately allow reception of distant Fox affiliates in commercial establishment outside the grade B contour of a local Fox affiliate, and Fox Networks should immediately make available other Fox sports and entertainment programming from DBS satellites to commercial operators when there is no other alternative to receive that programming *Id.* at 2-3.

[837] Applicants' Reply at 71-72 n.200.

[838] *Id*

[839] *See* 47 C.F.R. §25 148(c); *Policies and Rules for Direct Broadcast Satellite Service*, 17 FCC Rcd 11331, 11364 ¶ 65 (2002).

[840] *See Petitions Regarding DirecTV's DBS Service to the States of Alaska and Hawaii*, MB 03-82, Public Notice, DA 03-862 (rel. Mar. 25, 2003).

[841] *See* 17 U S.C. § 119.

UK regulator determined that BSkyB's behavior did not violate UK competition law. We assume that OFT continues to examine BSkyB's behavior as it continues to maintain its position of dominance.[825]

300 There is no evidence in the record indicating that BSkyB's current wholesale provision of programming is in violation of UK competition law, and although the company was found in an earlier investigation to be engaging in marginally anticompetitive activities, those same concerns appear to have dissipated during the more recent review. We do not believe it would be fair to focus on a set of behaviors, which BSkyB agreed to modify via specific undertakings and have since been modified or superceded by properly competitive behavior in the UK pay TV market, as evidenced by the lack of UK regulatory censure or referral for anticompetitive remedies. Furthermore, although it is instructive to examine the behavior of News Corp.'s various subsidiaries, we find that each of those subsidiaries functions in essentially a unique commercial environment and is subject to specific national regulatory regimes. To arbitrarily apply a set of conditions, as espoused by EchoStar, without taking into consideration the specific conditions and competitive dynamic of the relevant market, in this case the MVPD market in the United States, would be arbitrary and inappropriate.

F. Competitive Harms in Latin America and Impact on U.S. Consumers and Programmers

301. *Positions of the Parties.* EchoStar argues that the Commission should consider the impact the proposed transaction will have on MVPD markets in Latin America, as well as the resulting indirect impact on U.S. consumers and independent programmers.[826] EchoStar claims that the only two Direct-to-Home satellite providers in Latin America are affiliates of Hughes and News Corp., Galaxy Latin America and Sky Latin America, and cable is not a significant competitor to those two MVPDs. EchoStar argues that the proposed transaction will result in a near monopoly for MVPD services in Latin America, which will indirectly impact U.S. consumers by increasing the leverage of News Corp. as a "monopsonist" in Latin America to extract concessions from programmers in other countries, including the U.S.[827] EchoStar contends that the Commission has adequate authority to take this alleged harm under consideration based on the Commission's inquiry in 1997 involving Hughes acquisition of PanAmSat. EchoStar claims that in 1997 the Commission dismissed a concern regarding Sky Latin America, who had leased capacity from PanAmSat, because, in part, the programming ventures at issue would remain under separate ownership. Under the proposed transaction, EchoStar argues that the separate ownership relied upon in 1997 would be eliminated.[828] Tectelcom Tecnica em Telecommunicacoes Ltda. ("Tecsat"), a Brazilian company, also raises concerns about the competitive

[825] We note that it was announced on December 17, 2003 that the European Union and UK Soccer League had agreed to air some games on free television, thus forcing BSkyB to sell some rights of live soccer games to free-to-air broadcasters. Reportedly, the settlement means that BSkyB must lift its control over exclusive rights to as many as eight live games a season as early as next year. *See* WALL ST J., December 17, 2003 at D4; Associated Press, *EU Settles Antritrust Dispute Over Soccer Game Broadcasts*, Dec. 16, 2003.

[826] EchoStar Petition at 58.

[827] EchoStar Petition at 58.

[828] EchoStar Petition at 58 (citing *Hughes Communications, Inc.*, 12 FCC Rcd 7534, 7542 (1997).)

Finally, Applicants urge the Commission to reject EchoStar's request to subject News Corp. to certain conditions imposed on BSkyB in 1996 by UK regulatory authorities regarding prior approval of rate cards, channel unbundling, the submission of various accounts, and its control of proprietary encryption technology.[809] Applicants contend that there is no support offered by EchoStar for this type of unprecedented MVPD regulation, even on cable operators with far greater market share than DirecTV, and note that EchoStar did not recommend such conditions for itself in 1999 when News Corp. purchased a 32% share of EchoStar.[810]

296. *Discussion* In *MCIT/EchoStar*, the Commission was unpersuaded by arguments calling for the imposition of program access conditions on EchoStar in its acquisition of MCI and News Corp. satellite licenses.[811] One of the primary bases for these proposed conditions was the conduct of News Corp.'s BSkyB satellite service in the UK and the resulting program access conditions imposed on BSkyB by the UK regulatory authority.[812] The Commission did not, however, analyze BSkyB's conduct in the UK when it decided not to impose program access conditions. Instead, the Commission declined to impose the conditions because of an inadequate record to support a finding that EchoStar had market power and because of the ability of MVPDs to use the Commission's program access rules for redress if a News Corp programming arrangement resulted in price discrimination or unfair practices.[813] Thus, the Commission precedent discussed by Applicants is of limited assistance.

297. While the Commission generally does not consider harms resulting from a transaction occurring outside the United States in its public interest analysis of a transaction unless the transaction directly impacts a relevant domestic market, nothing in relevant statutory or case law would prevent the Commission from considering the conduct of the Applicants in foreign jurisdictions to determine the likelihood of similar future conduct in the United States.[814] Evidence regarding foreign conduct could provide useful guidance as to how Applicants might act in the United States if they had similar media assets and economic incentives. Based on our understanding of the UK BSkyB experience, however, we do not believe the proposed transaction would result in sufficiently parallel market conditions to warrant great reliance upon BSkyB's UK experience.

298. The UK's Office of Fair Trading (OFT) conducted two formal investigations of BSkyB's wholesale business practices. In its 1996 decision, OFT examined several complaints lodged against BSkyB, including its wholesale pricing for programming, programming packaging, programming rights, and conditional access services.[815] OFT's investigation determined that several of BSkyB's business practices warranted scrutiny, which led to BSkyB agreeing to submit separate accounting information for

[809] *Id.* at 70-71.

[810] *Id* at 71.

[811] *MCIT/EchoStar*, 16 FCC Rcd at 21621 ¶ 25.

[812] *MCIT/EchoStar*, 16 FCC Rcd at 21620 ¶ 23.

[813] *MCIT/EchoStar*, 16 FCC Rcd at 21621-22 ¶¶ 25-27.

[814] *See, e g , General Electric Capital Corp and SES Global, S A* , 16 FCC Rcd 17575, 17594 (2001).

[815] Office of Fair Trading, *The Director General's Review of BSkyB's Position in the Wholesale Pay TV Market (1996 Review)*, Dec. 1996.

291. *Discussion* The record does not demonstrate that the transaction is likely to increase DirecTV's incentive and ability to secure exclusive programming contracts with unaffiliated programmers, as its share of the MVPD market is not being increased by the transaction. In several prior mergers involving MVPDs, the Commission has rejected arguments that the post-merger entity should be required to abide by an exclusivity restriction with respect to programming of unaffiliated programming vendors.[795] Similarly, the Commission considered whether to expand the exclusivity provision to non-vertically integrated programmers in the last program access proceeding and found that such an expansion would directly contradict Congress' intent in limiting the program access provisions to a specific group of market participants.[796] Commenters have failed to offer a cogent rationale for doing so in the context of this proceeding.[797]

292. We disagree with the contention that the transaction will increase News Corp.'s ability to outbid EchoStar by leveraging its market power abroad in the worldwide distribution of sporting events to create market power in the United States. In making this claim, EchoStar apparently confuses News Corp.'s ownership of satellite assets covering broad geographic areas with the ability to deliver large audiences worldwide. In fact, only eight percent of television households throughout the world subscribe to DBS services.[798] The vast majority of the world's television households (61%) receive video programming only via free over-the-air television.[799] It is the ability to deliver large audiences via free over-the-air television, not large geographic areas, that increases a distributor's ability to secure rights to sports programming of worldwide interest, and News Corp. is competing for such rights with many international broadcasters who can deliver larger audiences.[800] In addition, the sporting events EchoStar is concerned about are governed by organizations such as Federation Internationale de Football Association ("FIFA")[801] or the International Olympic Committee ("IOC"), which seek to maximize distribution of the events, not restrict supply and raise prices. IOC, for example, only grants distribution rights to broadcasters who can guarantee the broadest coverage throughout their respective countries free of charge.[802] Therefore, while News Corp. has the ability to distribute the Olympics through its free

795 *See, e.g., Comcast-AT&T Order*, 17 FCC Rcd at 23290; *AT&T MediaOne Order*, 15 FCC Rcd at 9854-55.

796 *Program AccessOrder*, 17 FCC Rcd at 12158.

797 As stated previously, we have accepted without change Applicants' additional program access commitments, described in Section VI.C.4.a, *supra*, which specify that DirecTV may continue to compete for programming that is lawfully offered on an exclusive basis by an unaffiliated program rights holder (e.g., NFL Sunday Ticket).

798 According to the ITU, 8% of television households in the world subscribe to satellite delivered programming services, while 29% subscribe to programming services delivered via cable. The remaining households, over 600 million, receive their programming from over-the-air broadcasts. *See* International Telecommunication Union, World Telecommunication Indicators, Mar. 2001 at 71. We do not know News Corp.'s share of the worldwide DBS market, but the entire market represents only small percentage of the world's television viewers.

799 *Id*

800 EchoStar's concern that News Corp would "outbid" other MVPDs also is misplaced—the possession of market power by a buyer of programming confers the benefit of paying *lower* prices, not higher prices.

801 FIFA owns the television and radio rights to World Cup soccer matches.

802 "The IOC has often declined higher offers for broadcast on a pay-per-view basis or because a broadcaster could reach only a limited part of the population, as this is against Olympic Broadcast Policy. This fundamental IOC Policy, set forth in the Olympic Charter, ensures the maximum presentation of the Olympic Games by broadcasters (continued....)

owned an interest[781] As in the previous case, the solution to reduce competition was to tie together the economic interests of the firms through a formal joint venture. While neither case involved explicit collusion, both did involve creating formal organizations to force the firms to cooperate to achieve specific goals. The proposed transaction would create no such formal linkage of DBS and cable operators. The record is devoid of evidence of a history in the MVPD industry of the sort of loosely organized collusive relationships involving News Corp. and vertically integrated cable operators alleged by EchoStar.

286. EchoStar is also incorrect in its claim that there is no need to detect and punish deviation from a collusive arrangement. There are strong incentives in the video programming industry to deviate from collusive agreements because the marginal cost of acquiring additional viewers is near zero. Because the costs of programming production remain the same regardless of the number of viewers, each additional viewer and resulting dollar is almost entirely profit for a video programmer, thereby creating strong incentives to lower price and increase the reach of the programming, particularly in the face of a competitor that has naively agreed to maintain high prices. In addition to the existence of strong incentives to cheat on collusive agreements, it is difficult to detect cheating in collusive agreements in video programming markets. **[REDACTED]**.[782] **[REDACTED]**.

287. EchoStar's contention that following the transaction, the Applicants will have a reduced incentive to compete with vertically integrated cable operators on the basis of the revenue stream they obtain from providing video programming runs counter to the allegations of many commenters and our analysis of the potential vertical harms likely to result from this transaction. As we discussed above with respect to temporary foreclosure of RSN and local broadcast television signals, the profit margin DirecTV earns from each additional subscriber is substantial. This creates a strong incentive to drive customers to DirecTV, even when it requires sacrificing profits from video programming sales. In the case of regional sports networks and retransmission consent we found that in addition to having an incentive, the Applicants possess the ability to behave in this manner.

288. We examine EchoStar's three collusion scenarios in turn. EchoStar's proposed scenario regarding collusion between vertically integrated cable operators and the Applicants in the video programming market is at best a highly unlikely scenario unsupported by any facts in the record. EchoStar's hypothesis that it "and other non-vertically integrated MVPDs would have no programming assets with which to barter in this fashion, and therefore would simply have to absorb the higher rate without any corresponding benefit," ascribes a degree of market power and lack of substitutes to a broad range of video programming products which in general does not exits.[783] EchoStar's scenario of collusion in the set-top box market is curious. EchoStar claims that integrated MVPDs will "share standards, software, patents, and other assets,"[784] yet provides no evidence that any other integrated MVPD owns any assets used in set-top boxes.[785] Finally, EchoStar's allegation that following the transaction DirecTV will abandon all forms of broadband access in favor of partnerships with providers

[781] *See* DOJ Primestar Complaint.

[782] **[REDACTED]**.

[783] *2002 Video Competition Report*, 17 FCC Rcd at 26980-88, Tables C-1 and C-2.

[784] EchoStar Petition at 38.

[785] The leading set-top box manufacturers are Motorola, Scientific-Atlanta, Pioneer, Sony, and Pace. *Kagan Media Trends 2003* at 110-113.

rules would work perversely to ensure uniformly high programming prices and effectively police deviations.[770]

279. EchoStar argues that even without explicit collusion, News Corp. and cable MSOs have incentives to avoid hard competition with one another, especially on price, because, as carriers of each others' programming, the interested companies would share in each others' revenues, and so would avoid vigorous price competition at the MVPD level, which would effectively decrease the size of the total programming revenue pie.[771] In addition, EchoStar believes that News Corp./Hughes faces tough decisions about how aggressively to court cable consumers, and a revenue stream from cable programming alters that calculus by allowing News Corp. to earn some revenue from consumers remaining with cable. Thus, according to EchoStar, given the significant costs of luring customers from cable to satellite, it is predictable that programming revenue would make rational less aggressive competitive efforts than would otherwise be expected. EchoStar also notes that because News Corp. owns the Fox broadcast network, and to the extent that high cable and DBS prices push consumers to avoid pay programming altogether, News Corp. could recover some of its losses by increasing Fox network advertising revenues.[772]

280. EchoStar provides three scenarios to illustrate how collusion between News Corp. and the cable industry would undermine competition, raise rates and reduce choice for consumers. Under the "Programming Quid Pro Quo" scenario, in exchange for carrying a cable company's affiliated programming network at an inflated rate, News Corp. could demand that the cable company reciprocate with an inflated rate for a Fox network, to the detriment of non-vertically integrated MVPDs and consumers. Due to the non-discrimination program access provisions, both programmers would charge the same inflated rate to all MVPDs. Non-integrated MVPDs would have no programming assets with which to barter in this fashion, and therefore would simply have to absorb the higher rate without any corresponding benefit.[773] In its second scenario, EchoStar argues that rival MVPDs and consumers may be harmed by News Corp. and the cable industry extending their mutually beneficial arrangements to the set-top box market, with agreements to share standards, software, patents, and other assets to the exclusion of other MVPDs.[774] Finally, EchoStar argues that News Corp. will likely partner with cable operators for an alternative means of providing broadband services, rather than using DSL or facilities-based satellite broadband.[775]

281. Applicants deny the existence and the likelihood of a "cable cabal" made up of vertically integrated cable operators that would coordinate their behavior with DirecTV to compete less vigorously with one another. The Applicants argue that antitrust theory supports the notion that collusion of this sort is very difficult to establish and maintain, citing, for example, problems with the prevention of individual cartel members cheating on the cartel.[776] Applicants argue that EchoStar fails to establish how

[770] *Id* at 36.

[771] *Id* at 36.

[772] *Id.* at 37.

[773] *Id* at 38.

[774] *Id.* at 38-39.

[775] *Id* at 39

[776] Applicants' Reply at 73-74.

local Fox affiliates.[757] NAB argues that this change will give DirecTV substantially increased leverage over local affiliates, endangering their ability to serve local interests or provide diversity.[758] According to NAB, a bypass strategy would result in short-term harm to Fox affiliates in the form of lost retransmission consent fees, but also long-term harm to the network-affiliate relationship so critical to the American system of broadcasting.[759] To remedy this potential harm, NAB urges us to prohibit DirecTV from transmitting a Fox network feed in any market currently served by a non-Fox-owned local affiliate.[760] Applicants respond that a bypass strategy scenario makes no sense. Applicants contend they gain more from a broadcast affiliation system which reaches nearly 100% of the country than could be gained through a bypass model based on DirecTV's 13% market share.[761]

275. *Discussion.* Contrary to the contentions of NAB, we find that the transaction creates only a *de minimis* increase in the Applicants' ability and incentive to engage in a bypass strategy. Accordingly, we will not condition our approval of the transaction on the bypass prohibition proposed by NAB. NAB's bypass argument is a variation of the argument made by MVPDs that the transaction will give News Corp. the incentive and ability to engage in permanent foreclosure of access to its broadcast signals by competing MVPDs, which we analyzed above. The only difference between the bypass and permanent foreclosure strategies is that a bypass strategy would impose even greater revenue losses on News Corp. If it bypasses local affiliates, News Corp. will lose not only the advertising revenue associated with those rival MVPD subscribers that do not receive over-the-air broadcast signals but also the advertising revenue associated with all non-DirecTV subscribers. We do not find that it would be profitable for News Corp. to engage in permanent foreclosure in the previous situation, and we find it even less likely in NAB's proposed scenario. **[REDACTED]**.[762] **[REDACTED]**. In any event, because the proposed transaction would have a *de minimis* impact on News Corp.'s incentive to engage in this behavior, we do not view it as a likely outcome of the transaction.

C. Collusion with Cable MSOs

276. *Positions of the Parties.* EchoStar argues that the proposed transaction will give News Corp. new incentives to coordinate with other vertically integrated distributors (the large cable MSOs) to the detriment of independent distributors and consumers.[763] EchoStar argues that the proposed transaction will give News Corp. an opportunity to engage in collusive practices, as it will make complementary the interests of News Corp. and the large vertically integrated cable operators and will allow mutually beneficial, but anticompetitive, deals between those companies. Further, it claims that

[757] NAB Comments, Sidak Decl at ¶¶ 20-23.

[758] NAB Comments at 21-24. Sidak argues that the harm to Fox affiliates will have a ripple effect across the broadcast landscape to other affiliates. For example, Fox affiliates might be then willing to accept inferior terms from other broadcast network, diminishing the bargaining power of other local broadcasters in the same local area in their affiliation negotiations with their respective networks. NAB Comments at 22, Sidak Decl. ¶ 28.

[759] NAB Comments at 21-24.

[760] NAB Comments at 25-28.

[761] Applicants' Reply at 63.

[762] **[REDACTED]**

[763] EchoStar Petition at 32

will be no change in the number of voices in these markets.[748] They further state that in large markets where Fox does own broadcast stations, a wealth of other media outlets will ensure viewpoint diversity, so the transaction will have little or no effect.[749]

268. *Discussion.* We do not agree with NAB's assessment of the likelihood that post-transaction News Corp. will harm local stations by engaging in an affiliate bypass strategy and therefore adversely affect localism and diversity. As we explain elsewhere in this *Order,* we find that the transaction only creates a *de minimis* increase in the likelihood that News Corp. will engage in a bypass strategy and we conclude that therefore, there is no need to impose safeguards against such a strategy.[750] With respect to NAB's claim that the transaction will give DirecTV the incentive and ability to discriminate against unaffiliated broadcasters, we explain above that this is an unlikely result of the proposed transaction. Because we find that the transaction will not enhance DirecTV's incentive or ability to discriminate against unaffiliated broadcasters,[751] we conclude that the combination does not pose a risk of harm to localism or diversity on that basis. As we explain elsewhere in this *Order*, the mandatory carriage provisions of the SHVIA and our rules implementing the statute will ensure that broadcasters will have access to the DirecTV platform in all markets where DirecTV offers local-into-local service. Finally, we disagree with NAB that information sharing between DirecTV and Fox will adversely affect broadcasters negotiating agreements with either entity, and we will not impose a condition limiting the Applicants' communications concerning such agreements. As we explain in our discussion of limitations on information sharing in section VI.C.4, *supra*, we find that the confidentiality provisions of the retransmission consent and program carriage agreements make such information sharing unlikely. In addition, NAB also has not specified what harms could result from such information sharing even if it could be accomplished.

269. We do not agree with NRTC that News Corp.'s ownership of local television broadcast stations and an MVPD outlet in certain markets will harm viewpoint diversity. NRTC has not demonstrated how common ownership of DirecTV and local broadcast television stations would result in a loss of diversity of viewpoint that would be harmful to the public interest, particularly given the prevalence of the multiple sources of news and informational programming from broadcast, MVPD and print sources, and the fact that DBS is not currently a source of local news or other local content.

270. We also disagree with commenters who contend that the transaction will reduce viewpoint diversity by giving News Corp. the incentive and ability to discriminate against unaffiliated program producers (*i.e.*, those who sell programs to networks). We find that our program carriage rules, combined with Applicants' proposed commitment not to discriminate against unaffiliated programmers, are sufficient to protect against any potential harms.[752]

[748] Applicants' Reply at 66

[749] Applicants' Reply at 65-66.

[750] Indeed, it is not clear that a bypass strategy, if successful, would not actually promote viewpoint diversity because, while Fox programming would remain available in the market on DirecTV, the television broadcast stations formerly affiliated with Fox would remain in existence, and the licensees of these stations would remain obligated to offer programming relevant to the needs and interests of their communities—presumably adding a voice to the market. *See* Section VI.C.3, *supra.*

[751] *See id*

[752] *See* Section VI.C 4 and IX, *supra.*

263. *Positions of the Parties.* CDD and others contend that the transaction will result in a loss of both local and national perspectives.[727] They assert that if the transaction is approved, News Corp. will have the incentive and ability to competitively disadvantage unaffiliated content providers and to launch new programming networks on its own distribution system, allowing it to dominate what programming is available to consumers.[728] CFA contends that the transaction will result in a degree of concentration and lack of diversity of media voices that is in direct contravention of the public interest.[729]

264. NRTC is concerned that the transaction may adversely affect viewpoint diversity by eliminating a "voice" in all markets where DirecTV offers DBS service and Fox provides over-the-air broadcast service.[730] NRTC states that this potential for harm to viewpoint diversity is greater in smaller markets, which have fewer distinct voices.[731] NRTC asserts that the Commission cannot evaluate the effects of the proposed transaction on viewpoint diversity without first determining how many homes have access to cable, because without this information, it cannot determine how many media outlets will be available post-transaction in various markets.[732]

265. NAB contends that, absent conditions, the proposed transaction will harm local television broadcast stations, endangering the stations' ability to advance the core public interest goals of diversity and localism.[733] NAB asserts that the post-transaction News Corp. will have the incentive and ability to use a national network feed to distribute the programming it currently offers via local television broadcast stations.[734] According to NAB, the ability to "bypass" television broadcast station affiliates would give post-transaction News Corp enhanced bargaining power in its relationships with its affiliates.[735] NAB contends that the transaction also gives DirecTV the incentive and ability to discriminate against local television broadcast stations not affiliated with the Fox Network, which may take the form of refusal to carry unaffiliated stations, discriminatory channel positioning, or technological discrimination.[736] NAB also is concerned that the sharing of information between Fox Network and DirecTV on the terms of retransmission consent and affiliation agreements could give both entities negotiating leverage over local broadcasters with respect to such agreements.[737] NAB urges us to

[727] CDD Petition at 2 CFA Reply Comments at 4-5; NRTC Petition at 9-15.

[728] CDD Petition at 3; CFA Reply Comments at 4-5

[729] CFA Reply Comments at 1.

[730] NRTC Petition at 10-11. According to NRTC, the Commission determined that DBS should be considered a voice for purposes of analyzing viewpoint diversity in the *EchoStar-DirecTV HDO*. *Id.* (citing *EchoStar-DirecTV HDO*, 18 FCC Rcd at 20583-85 ¶¶ 49-52).

[731] NRTC Petition at 11.

[732] NRTC Petition at 13.

[733] NAB Ex Parte at 2, NAB Comments at 11, 21-24.

[734] NAB Comments at 15-19.

[735] NAB Comments at 19; *see also* NRTC Petition at 16.

[736] NAB Comments at 20-21

[737] NAB Comments at 26-27.